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PETITION FOR CERTIORARI.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

PETITION FOR THE WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

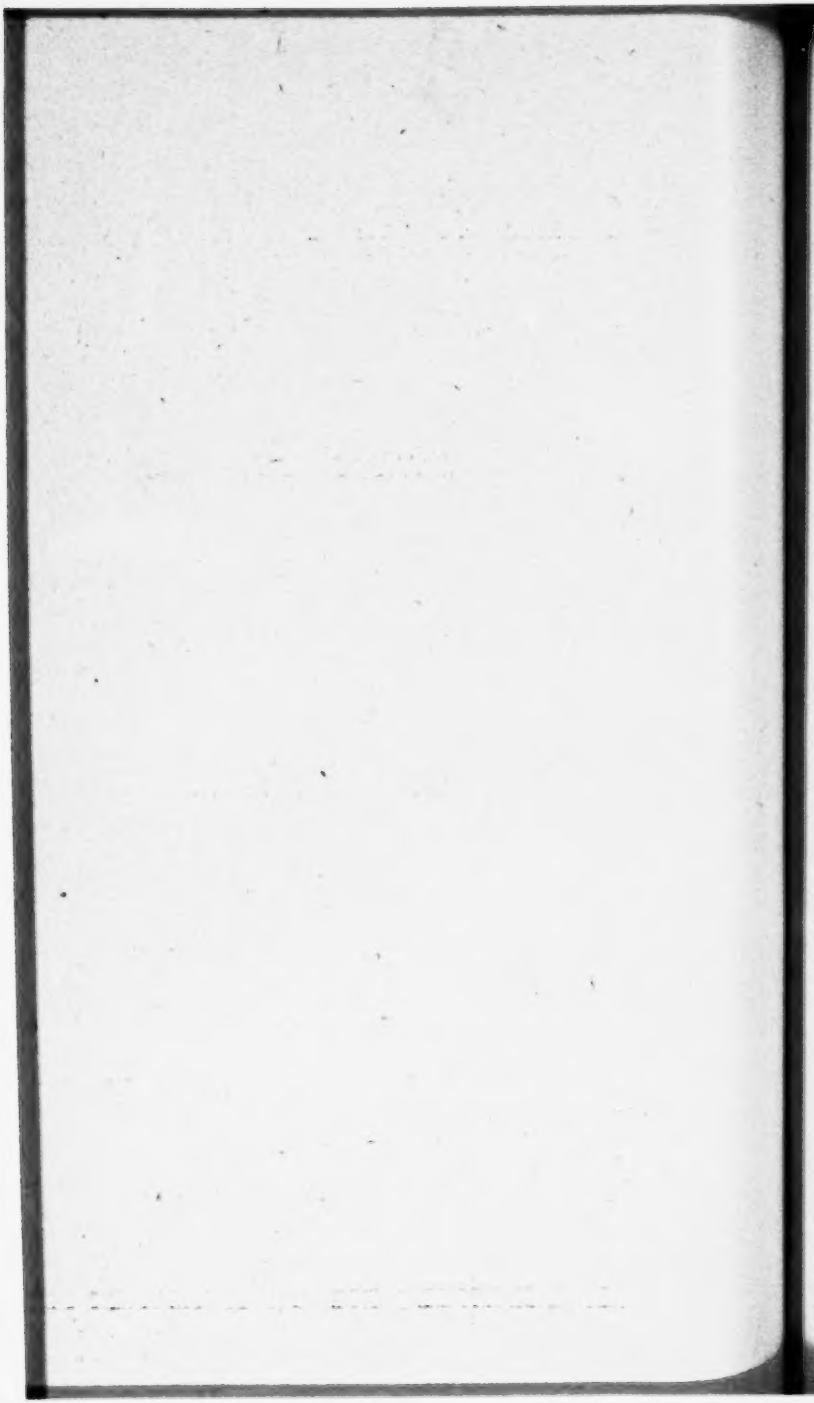
FRED A. McMASTER, ADMINISTRATOR,
Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY,
Respondent.

HENRY J. TAYLOR, SIOUX CITY, IOWA,
FRANK E. GILL, SIOUX CITY, IOWA,
ERIC A. BURGESS, SIOUX CITY, IOWA,
Solicitors and of Counsel for Petitioner.

F. ELKINS BROS. CO., SIOUX CITY.



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FRED A. McMASTER, ADMINISTRATOR,

Petitioner,

vs.

NEW YORK LIFE INSURANCE CO.,

Respondent.

PETITION FOR THE WRIT OF CERTIORARI TO REQUIRE THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, TO CERTIFY TO THE SUPREME COURT OF THE UNITED STATES FOR ITS REVIEW AND DETERMINATION THE CASE OF FRED A. McMASTER, ADMINISTRATOR, PLAINTIFF IN ERROR, VS. NEW YORK LIFE INSURANCE COMPANY, DEFENDANT IN ERROR.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The Petitioner respectfully shows to this Honorable Court as follows:

I.

STATEMENT OF THE CASE.

This is an action by the petitioner, Fred A. McMaster, as administrator of the estate of Frank E. McMaster,

deceased, against the respondent, New York Life Insurance Company, upon five policies of insurance, dated December 18, 1893, for $1000 each on the life of the deceased. The assured died January 18, 1895. The policies had been taken under the one emphatic inducement that they would grant thirteen months' insurance for the first annual premium.

After the application had been signed by the assured and delivered to the agent, the agent, without the knowledge or consent of the assured, wrote on the face of the application the words: "Please date policy same as application." It was this secret forgery of the agent to further his own private interests that has caused all the trouble.

The company did not follow the secret direction of the agent, but dated the policies December 18th, and made the second annual premium payable December 12th, the date of the application. By oral agreement and by express provision of the application, which became a part of the policies, the policies were not to go into force or effect until after delivery and the payment of the first premium.

When the policies were delivered by the agent, the assured asked whether they were as had been represented, and whether they insured him for thirteen months for the first annual premium, as had been agreed, to both of which questions the agent gave an affirmative answer, and, thereupon, the assured paid the agent the full first annual premium, to-wit: $105 in cash.

The company resists a recovery on the policies upon the ground that they had lapsed prior to the death of the assured, because of his failure to pay the second annual

premium alleged to be payable under the terms of the policies on December 12, 1894.

The policies of the company grant a full month of grace (p. 9). Its answer herein admits that "This defendant grants to the insured in said defendant company a grace of one month on the payment of premiums" (p. 20). This full month of grace is a conceded fact.

Inasmuch as this is a law action, tried to the Circuit Court without the intervention of a jury, and one in which the trial Court made special findings of fact as the sole basis for the judgment in respect to which error is assigned, the said findings, being brief, will best serve here as the statement of facts. The findings are as follows:

"By written stipulation duly signed and filed, the parties to this action waived a jury trial, and consented to try the case before the Court, and the evidence having been fully submitted the Court finds the facts established by the evidence to be as follows:

1st. The plaintiff, Fred A. McMaster, was, when the suit was brought and is now, the lawfully appointed administrator of the estate of Frank E. McMaster, deceased, having been appointed administrator of the named estate by the Probate Court of Woodbury County, Iowa, and furthermore said plaintiff was, when this suit was brought and is now a citizen of the State of Iowa, and a resident of Woodbury County, Iowa.

2nd. That the defendant, the New York Life Insurance Company, was, when this suit was brought and is now, a corporation created under the laws of the state of New York, having its principal office and place of business in the city of New York in the state of New York, but being also engaged in carrying on its business of life insurance in the state of Iowa, and other states.

3rd. That in December, 1893, F. W. Smith, an agent for the New York Life Insurance Company, residing at

Sioux City, Iowa, solicited Frank E. McMaster to insure his life in that company, and as an inducement to taking the insurance, pressed upon McMaster the provision adopted by the company and set forth in the circulars issued by the company, and printed on the back of the policies issued by the company under the heading, "Benefits and provisions referred to in this policy," in the following words: "After this policy shall have been in force three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of five per cent. per annum for the number of days during which the premium remains due and unpaid, during said month of grace the unpaid premium, with interest as above, remains an indebtedness due the company, and in the event of death during the said month, this indebtedness will be deducted from the amount of the insurance."

4th. Relying on the benefits of this provision, and in the belief that if he accepted a policy of insurance upon his life from the New York Life Insurance Company, paying the premiums thereon annually, the company could not assert the right of forfeiture until thirteen months had elapsed, since the last payment of the annual premium, the said Frank E. McMaster signed an application for insurance in said company, dated December 12, 1893, of the form which is made part of the policies sued on and attached to the petition, the same being made part of this finding of facts.

5th. In the application when signed by Frank E. McMaster, it was provided that the amount of insurance applied for was the sum of $5,000, to be evidenced by five policies for $1,000 each, on the ordinary life table, the premium to be payable annually.

6th. There now appears on the face of the application, interlined in ink, the words, "please date policy same as application." These words were not in the application when it was signed by McMaster, but after the signing thereof, they were written into the application by F. W. Smith, the agent of the New York Life Insurance Company, without the knowledge or assent of Frank E. McMaster, and were so written in by the agent in order to

secure to the agent a bonus which the company allowed to agents for business secured during the month of December, 1893, and it does not appear that Frank E. McMaster ever knew that these words had been written into the application, and it affirmatively appears that he had no knowledge thereof when the application was forwarded to the home office of the company and was acted on by the company.

7th. By the express understanding had between F. W. Smith, the agent of the New York Life Insurance Company, and Frank E. McMaster, when the application for insurance was signed, it was agreed that the first year's premium was to be paid by McMaster upon the delivery to him of the policies and that the contract of insurance was not to take effect until the policies were delivered.

8th. The defendant company, at its home office in New York City, upon receipt of the application, determined to grant the insurance applied for, and issued five policies each for the sum of $1,000, dated December 18th, 1893, and reciting on the face thereof that the annual premium on each policy was $21, and forwarded the same to its agent, F. W. Smith, at Sioux City, Iowa, for delivery to Frank E. McMaster. These five policies are in the form of the one attached to the petition in this case, which is hereby made a part of this finding of fact, and each policy contains the recital: "This contract is made in consideration of the written application for this policy, and of the agreements, statements, and warranties thereof, which are hereby made a part of this contract, and in further consideration of the sum of twenty-one dollars and .... cents to be paid in advance, and of the payment of a like sum on the 12th day of December in every year thereafter during the continuance of this policy."

9th. The five policies enclosed in envelopes, on or about December 26th, 1893, were taken by F. W. Smith, the agent of the defendant company, to the office of Frank E. McMaster, who asked the agent if the policies were as represented, and if they would insure him for the period of thirteen months, to which the agent replied that they

did so insure him, and thereupon McMaster paid the agent the full first annual premium, or the sum of $21, on each policy, and without reading the policies he received them and placed them away.

The agent did not in any way attempt to prevent McMaster from reading the policies, and he had the full opportunity for reading them, but in fact did not read them and accepted them on the statement of the agent of the company, as hereinabove set forth.

10th. That not later than November 17th, 1894, notice was sent to Frank E. McMaster of the coming due of the premiums on the policies issued to him by the defendant company, in accordance with the requirements of the statutes of the state of New York.

11th. The renewal receipts for the second annual premium on the five policies held by Frank E. McMaster, in the defendant company, were sent for collection to Mary A. Ball, at Sioux City, Iowa, who on the 11th or 12th day of December, 1894, called on said McMaster for payment of the premiums in question. At that time McMaster declined making payment thereon, saying that he had seen other policies which promised better results, and that he did not think he would renew the insurance in the defendant company. Miss Ball told him the New York contracts had some nice provisions like thirty days of grace and loans, and in reply to an inquiry from McMaster, stated that his policies entitled him to the month's grace in the payment of the premiums, and that, as he understood it, the grace on the second premium would expire January 11th, and McMaster said if he concluded to keep any of the insurance he would call and pay for it before the grace expired.

12th. That in November or December, 1894, Frank E. McMaster was examined for the purpose of obtaining life insurance by the agents of the Union Central Insurance Company, it being understood between the parties that the policies were not to issue until in January, 1895, and it being the purpose of McMaster to take one or two thousand dollars' insurance in the Union Central Company,

at the expiration of his insurance in the defendant company, but also to continue part of the policies held in the defendant company.

13th. That on or about January 15th, 1895, the agent of the Union Central Company meeting McMaster on the street in Sioux City, told him the policies issued by the Union Central Company had been received, and in reply McMaster said, "All right; just hold them; there is no hurry about them," and in the same conversation he stated that he had other insurance, referring to the policies in the defendant company.

14th. That the action of Frank E. McMaster shows and the Court so finds the fact to be, that the said McMaster believed that the policies issued to him by the defendant company would continue in force for the period of thirteen months from the date of the policies, and his action with respect to the policies in the defendant company and the proposed insurance in the Union Central Company, was based upon and governed by this belief on his part.

15th. That Frank E. McMaster died at Sioux City on the morning of January 18th, 1895.

16th. That up to the time of his death, the said Frank E. McMaster had not paid the second year's premiums on the policies issued to him by the defendant company, nor have the same been paid since his death, nor had the said McMaster received or paid for the policies issued by the Union Central Company, and the same had not been delivered or become effectual.

17th. That due and sufficient notices and proofs of the death of said Frank E. McMaster were immediately sent to and received by the defendant company, and due demand for the payment of the five policies sued on was made by the plaintiff, as administrator of the estate of Frank E. McMaster, and refused by the defendant company, on the ground that the policies in question had lapsed and were not in force at the time of the death of said Frank E. McMaster, by reason of the failure to pay the second year's premium coming due on said policies.

18th. That the defendant company has not paid said policies or any part thereof, and assuming the same to be valid, there is due thereon, November 1, 1898, the sum of ($5,965.00) five thousand nine hundred and sixty-five dollars, after deducting from the face of the policies the amount of the second premiums with interest thereon to March 14, 1895."

The form of the policy, annexed by copy to the petition, is made a part of the foregoing findings, and is set out in full on pages 6 to 14, inclusive, of the Record.

II.

THUS FAR TWO JUDGES HAVE FILED SEPARATE OPINIONS FAVORING AND TWO JUDGES SEPARATE OPINIONS AGAINST A RECOVERY.

There are as many opinions in this case as there are judges who have heard it. Judges Shiras and Caldwell hold that the petitioner should recover; Judges Sanborn and Thayer hold that he should not.

The opinion of the trial Court, Judge Shiras, is found in the Record (pp. 35-52) and favors a recovery.

The opinion of Judge Sanborn, which denies a recovery, is found on pages 71-83 of the Record.

The opinion of Judge Thayer, which also denies a recovery, is found on pages 83-4 of the Record.

The dissenting opinion of Judge Caldwell, which sustains a recovery on the policies, is found on pages 84-101 of the Record.

Each of these distinguished jurists has filed a separate opinion that bears evidence of careful study, exhaus-

tive research and an appreciation of the gravity and importance of the case far beyond anything that was personal to this petitioner. In a more comprehensive way this consideration is due to the far reaching consequences of the decision, and as representing the final step in a legal controversy that originated as far back as the case of *Plumb* v. *Insurance Company*, 18 N. Y., 392, and which was again vigorously renewed in the recent case of *Insurance Company* v. *Norwood*, 69 Fed. Rep., 71. The decision in this case, in the opinion of Judge Caldwell (p. 99), amounts to a reversal of the *Norwood* case.

The petitioner asked a rehearing of this case in the Circuit Court of Appeals (p. 103), but his petition was denied January 22, 1900 (p. 131).

This Court will, of course, read all these opinions, and, therefore, the necessity for extended presentation is avoided.

While Judge Thayer concurs with Judge Sanborn, he is not willing to adopt Judge Sanborn's opinion, but only the result thereof. Indeed, each of the four judges rests his individual opinion upon various and different grounds, although Judges Shiras and Caldwell substantially agree. A brief quotation from the dissenting opinion of Judge Caldwell will indicate the gravity and importance of the case, as well as the deep seated conviction that the judgment on which we now ask this Court to grant the writ of certiorari, is radically wrong. In his dissenting opinion Judge Caldwell says:

"THE RIGHT DECISION OF THIS CASE DOES NOT DEPEND UPON ANY TECHNICALITIES OF LAW. IT IS A CASE IN WHICH COMMON SENSE AND COMMON HONESTY AND LEGAL SENSE AND LEGAL HONESTY ARE AT ONE." (P. 84).

Referring to the decision of the majority, Judge Caldwell further says:

"The rule of the Court obliterates all distinction between truth and falsehood in the dealings of men. It establishes the doctrine that the law has no partiality for truth and no prejudice against falsehood. It applauds and approves an end obtained by falsehood and fraud as a high exhibition of business tact and skill, and reserves its censures for the innocent and trusting victim of the fraud, because, forsooth, he accepted as true the word of the man he was dealing with; and it permits the party who made the false representation to avail himself of his own falshood to the prejudice of the man who trusted him. It makes confidence and bunco games respectable and elevates the sharper who practices them to a plane of equality with honest and reputable business men. It is a rule at which all rascaldom will rejoice, and all honest and trustful men take alarm. It stimulates falsehood and deceit by the grant of impunity, and destroys confidence among men. It converts written contracts which were designed to prevent fraud into the most powerful agencies for the perpetration and protection of fraud. * * Not one case cited by the majority is an authority *on the facts of this case*" (p. 99).

Judge Shiras (Record, p. 52) invited an appeal from his judgment in these words:

"If free to give judgment according to my own view of the questions involved, I should find for the plaintiff; but, as already stated, the Circuit Court of Appeals held in the equity case (87 Fed. Rep., 63) that there could be no recovery on the policies at law or in equity, and I deem it my duty to follow this ruling, leaving it to the plaintiff to carry this action at law before the Court for its further consideration, and, therefore, while my opinion is with the plaintiff, the judgment must be for the defendant.'

III.

THE SPECIAL FINDINGS OF THE CIRCUIT COURT AS TO NOTICE ARE INSUFFICIENT TO AUTHORIZE THE JUDGMENT OR TO SUSTAIN THE SAME ON APPEAL.

The application declares this insurance contract to be a New York contract (p. 12). The policies refer expressly to the New York statute of notice as Chapter 690, Laws of 1892, State of New York (p. 10), and they are made payable in case of loss in New York state (p. 6), and were there advised, issued and dated, and there proofs of death were to be made (pp. 6-9). The application is made a part of the policies (p. 12), and that expressly says that the policy and application "shall be construed according to the laws of the state of New York, the place of said contract being agreed to be the home office of said company in the city of New York" (p. 12).

The New York statute for many years has contained very stringent provisions requiring elaborate and explicit notice before forfeiture is permitted. This statute became a part of the contract and is set out in the brief filed in support of this petition, and also in the dissenting opinion of Judge Caldwell, page 99 of the Record.

The 10th finding as to notice, *supra* (p. 6), does not meet the statutory requirements that the notice shall be sent "at least fifteen and not more than forty-five days prior to the day when the same (premium) is payable," for the finding might be true and the notice have been sent sixty or ninety or one hundred days before the same was payable. The last clause of the finding is of no force,

in that the same is the statement of a mere legal conclusion. A copy of the notice sent is not contained in the findings, nor in any manner made a part thereof, nor is the substance of the notice upon any essential point stated or found.

Each of the several recited requirements of the New York statute, as construed by the highest Court of that state and approved by the Federal Courts, must be followed with unusual clearness and detail in order to constitute a notice sufficient to work a forfeiture. The finding of the Circuit Court is insufficient upon every one of the essential requisites. As Judge Caldwell says:

"It will be observed that there is a total failure to find the facts showing a compliance with the statute by the company. * * * It is not upon such a finding that a Court can declare a forfeiture. The rule is absolute and without an exception that the special finding of fact of the lower Court must distinctly and specifically find every fact essential to support its judgment. Nothing can be supplied by intendment. The next clause of this finding, namely, that the notice was sent to Frank E. McMaster of the coming due of the premiums on the policies issued to him by the defendant company in accordance with the requirements of the statute of the state of New York is fatally defective for the reason that it states a mere conclusion of law, and finds no fact whatever."

IV.

IN THE CIRCUIT COURT OF APPEALS, THE CASE TURNED ON THE PAROL-EVIDENCE RULE. IT SHOULD HAVE TURNED ON THE DOCTRINE OF ESTOPPEL IN PAIS.

This Court has said, *Insurance Company* v. *Hearne*, 20 Wall., 490, that the assured "had a right to assume that

the policy would accurately conform to the agreements thus made, and to rest confidently in that belief."

Judge Sanborn admits that the policies are not responsive to the agreements for insurance, but constitute what he calls "a counter proposition" upon the one controlling inducement that secured the business to the company, to-wit: thirteen months of insurance for the first full annual premium.

It is concluded by the special findings, based on admitted evidence, that the assured was to have a policy the terms of which would grant him thirteen full months of insurance for the first annual premium. Judge Sanborn's alleged "counter proposition" is construed to have reduced this time to twelve months and seventeen days, depriving the insured of nearly half of the extra month of grace feature, which was so successfully heralded by the agent and "by circulars issued by the company" (3d finding, p. 32), and by provisions printed on the back of the policy itself. This "counter proposition" was delivered to the assured without advising or warning him that the policies involved a counter proposition.

More than this, in response to the searching, exacting and comprehensive inquiries of the assured put to the agent at the moment of the delivery of the policies and the payment of premiums, the company represented that the terms of the policies were as represented, and that they did insure him for the full period of thirteen months, and the assured, relying upon these representations as to existing facts in the terms of the completed policies, accepted them, placed them away unread before the eyes of the agent, to whom he then paid "the full first annual premium."

It is urged that such conduct as is disclosed in the special findings estops the respondent company from asserting the provisions, if any, of the policies that would deprive the assured of thirteen months of insurance from the agreed time, and as stated in the application, to-wit: thirteen months' insurance from the delivery of the policies and payment of the premiums, December 26, 1893. The statements of the agent in reference to the existing terms of the policies were known to him to be false, but were relied upon by the assured to his possible damage. That the guilty party may not render his fraud effectual, the parol evidence rule must yield to the rule of equitable estoppel.

Insurance Co. v. *Wilkinson*, 13 Wall., 222.
Equitable Ins. Co. v. *Hearne* 20 ,Wall., 494.

V.

UPON THE LEGAL PROPOSITIONS UNDER WHICH THE MAJORITY OF THE CIRCUIT COURT OF APPEALS DENIED A RECOVERY ON THE POLICIES, THE DECISIONS OF THE SEVERAL UNITED STATES CIRCUIT COURTS OF APPEALS ARE NOT UNIFORM. AND. THEREFORE, IN THE INTEREST OF UNIFORMITY OF DECISIONS, THE WRIT SHOULD BE GRANTED.

We concur with Judge Caldwell (p. 99) in his statement that the opinion in *Fireman's Fund Insurance Company* v. *Norwood*, 16 C. C. A., 136, "is exactly opposed to the opinion of the majority in this case," as well as the further conclusion of that learned judge to the effect that the judgment in this case is not only "diametrically opposed" to the *Norwood* case, but also to the case of *McElroy* v. *British American Insurance Company*, 94 Fed. Rep.,

990, 1000, in the Circuit Court of Appeals for the Ninth Circuit, and to the case of *London & L. Ins. Co.* v. *Fischer*, 92 Fed. Rep., 500, 34 C. C. A., 503, in the Circuit Court of Appeals for the Sixth Circuit.

We also concur with the statement of Judge Caldwell that the judgment in this case violates the rule of estoppel in pais, which "has been more frequently and effectively applied by the Supreme Court of the United States than by any other Court."

VI.

IT IS UNCONTRADICTED THAT THE GRIEF OF THIS CONTROVERSY WAS ACTUALLY WROUGHT BY THE UNAUTHORIZED AND WRONGFUL INTERLINEATION OF THE WORDS IN THE APPLICATION BY THE AGENT OF THE INSURANCE COMPANY—"PLEASE DATE POLICY SAME AS APPLICATION" (6TH FINDING, P. 32)—AND THAT THE ASSURED NEVER KNEW OF OR CONSENTED TO SUCH WRONGFUL INTERLINEATION.

The scribe, upon reading the fraudulent interlineation, overlooked the agreement contained in the application (p. 12, par. 4), to the effect that the insurance should not be in force until the delivery of the policies and the payment of the premiums, and while dating the policies December 18th, the day the risk was advised, assumed to make the second premium payable as early as December 12th, the date of the application, all for the secret purpose of increasing the agent's bonus (6th finding, p. 32).

This mistake, cheat or fraud, is called by Judge Sanborn a "counter proposition," which, however, was itself not only concealed from the assured at the time of de-

livery and payment, but the full first annual premiums were then exacted, and ever since have been retained, on the emphatic oral and printed representations made by the company that the policies by their terms gave the assured thirteen full months of insurance. To borrow the language of Judge Shiras this was the "nice provision" that induced the business. Even where no representations concerning the terms of the policies were made at the time of delivery and the payment of the premium, this Court has said "he (the assured) had a right to assume that the policy would accurately conform to the agreements thus made, and to rest confidently in that belief."

Equitable Ins. Co. v. *Hearne*, 20 Wall., 494.

Paragraph 2 of the company's amended and substituted answer (p. 20) alleges that the words in the application, "please date policy same as application," amount to "a request that said five policies each should be *issued, dated and take effect* the same date as the application, namely, the 12th day of December, 1893, and said request was complied with, and the policies were so issued."

This is the company's deliberate understanding and interpretation of the meaning and effect to be given to those words. At any rate, its present position is fixed by that part of the answer above quoted as to the natural and actual effect to be given to the so called request of its agent interpolated into the application. Upon this surreptitious and falsified interlineation, admittedly so acted upon by the company as to thus far defeat a recovery upon the policies, the Circuit Court made an express finding (6th finding, pp. 32-3) to the effect that it was inserted by the company's agent after the application had

been signed and delivered to the company without the knowledge of the assured, and it is certain that the assured never learned of it (9, 12, 13, 14 findings, pp. 33-4).

The application as signed and delivered called for a whole year's insurance, not to take effect until the delivery of the policies and the payment of the premium, to-wit: on December 26, 1893 (par. 4, p. 12, and 7th finding, p. 33). This forged interlineation, "please date policy same as application," is construed by the company itself in its own amended and substituted answer as a request (par. 2, p. 20) to have the policies take effect at the date of the application, to-wit: December 12, 1893, and the answer declares that such was the import and result of the interlineation that the company strictly complied therewith in the form of the policies delivered.

McMaster's application called for a whole year's insurance, not from the date of the application, but from the date of the delivery of the policies and the payment of the premium. This was the express agreement (7th finding, p. 33). The falsified interlineation of the company's agent is, therefore, admitted to be diametrically opposed to the express agreement made conclusive upon this Court by the 7th finding (p. 33). The company insists that the policies by their terms are responsive to this falsified interlineation, and not to the agreement found in the 7th finding.

Judge Sanborn says that the policy is a counter proposition to the 7th finding and to the application itself; but the provisions of the application and agreement by express finding are now binding on the parties and the Court.

It is pertinent and proper to insist that the company's own interpretation of the natural meaning and the actual result of the agent's interpolation conclusively makes it the falsified interpolation of the company itself.

The only "request" addressed to the company on this point was its own agent's wrongful interlineation in the application, which the answer of the company (par. 2, p. 20) now makes responsible naturally and actually for the entire grief of this controversy.

Judge Sanborn says that this interpolation (p. 80) is immaterial, first because it was not complied with; and, second, because it misstated no fact which conditioned the insurance; but the defendant's answer (par. 2, p. 20) shows that it was not only a forgery, but a material and inconsistent provision, naturally and logically robbing the assured of his express agreement with the company (7th finding, p. 33). Judge Shiras expressly found that the promise of thirteen months' insurance for the first premium conditioned the insurance. Add to this falsified interlineation the additional falsehoods at the time of the delivery of and payment for the policies (findings 3, 4, 9, 12, 13, 14), and we have both legal fraud and bad faith. The conduct of the company and its agent is certainly worse than any alleged negligence of the assured, and it is pertinent to inquire on whom the loss should fall. Had it not been for this wrongful interlineation by the agent, unknown to and concealed from the assured, the defense to this suit admittedly would not have any basis in the terms of the insurance contracts. The "terms" of the contract exclusively relied on to sustain respondent's only defense are alleged in the answer to be the natural and actual result of the agent's forged instruc-

tion, which are further diametrically opposed to the only agreement, oral or written, known to or made by the assured. The respondent should be estopped from reaping any advantage from this forged interlineation. The respondent ought not to plead its own wrong to forfeit the policy.

Continental Ins. Co. v. *Chamberlain*, 132 U. S., 304.
Union Mut. L. Ins. Co. v. *Wilkinson*, 13 Wall., 222.
Am. Ins. Co. v. *Mahone*, 21 Wall., 152.
N. J. Mut. L. Ins. Co. v. *Baker*, 94 U. S., 610.

Had the assured died prior to December 26th, 1893, the company would have denied the valid existence of any insurance contract, under the terms of the application (par. 4, p. 12), and yet it now says in its answer (par. 2, p. 20) that the policies took effect December 12, 1893, responsive to the agent's forged interlineation, notwithstanding the express agreement of the parties (7th finding, p. 33), repeated in the application, that the contract of insurance was not to take effect until the delivery of the policies, to-wit: on December 26, 1893.

We reiterate that the interlineation, "please date policy same as application," was forged by the agent of the company after the application had been signed and delivered to the company, without the knowledge of the assured, and was affirmatively concealed from the assured, and that the company's own answer says "said application also contained a request (please date policy same as application) that said five policies each should be issued, dated, and take effect the same date as the application, namely, the 12th day of December, 1893, and said request was complied with, and the policies were so issued."

At whose door is laid the cause of plaintiff's loss, if he must lose? The company admits by its answer that this controversy is grounded upon the words, "please date policy same as application," and on the testimony of the agent himself the trial court found this interlineation wrongful and unknown to the assured. Were it not for this interlineation, the payment of the second premium would have been called for at a date certainly not earlier than the actual date of the policy, which would have obviated this whole controversy.

In this connection, the Court should always bear in mind the month of grace thus stated in respondent's answer as well as in its policy (par. 2, p. 20): "this defendant grants to the insured in said defendant company a grace of one month on the payment of premiums." The company was not to be released upon the failure of the assured to pay the second annual premium when it matured; it was only to be released at the end of a full month of grace thereafter.

VII.

THE PETITIONER CONTENDS THAT THE PROVISIONS OF THE WRITTEN AGREEMENTS, WHEN PROPERLY CONSTRUED, DO GRANT THIRTEEN MONTHS OF INSURANCE FOR THE FIRST FULL ANNUAL PREMIUM.

This proposition is so convincingly elaborated by Judge Shiras (Record, pp. 35-52) that we adopt his statement and argument as a ground for the petitioner's prayer for the writ.

The assured paid the first full annual premium, which paid for thirteen months of insurance, counting the month of grace. This much was promised. The representation was positively renewed as an existing fact, under the terms of the completed policies, at the time of their delivery. Having paid for thirteen full months' insurance, the policies are susceptible of a resonable construction that will grant thirteen months of insurance. Whatever may be the effect of the date, December 12th, upon renewals for subsequent insurance, having accepted and retained the first full annual payment, under the written agreement that the insurance should not begin until the delivery of the policies and the payment of the premiums, the assured should not now be subjected to a forfeiture which in effect forfeits insurance already paid for.

VIII.

THE "DUE DATE" OF THE POLICY IS ITSELF AMBIGUOUS, INDEFINITE AND ELASTIC, AND THE ALLOWANCE OF 13 MONTHS' INSURANCE FOR THE FIRST PREMIUM, DOES NOT VARY THE TERMS OF THE POLICY.

The case of *Baxter* v. *Brooklyn Life Ins. Co.*, 119 N. Y., 454, shows that the "due date" of the policy is not fixed or determined by the date written upon the face of the policy, but by a date "after notice and the expiration of the thirty days" provided for in the New York statute. The company had a clear leeway in the giving of notice, and by adjusting the same could have granted thirteen months' insurance without offending against the provisions of the policies, construed in the light of the controlling provisions of the New York statute.

The promise of thirteen months' insurance was the full equivalent of an agreement on the part of the company that it would not attempt to enforce a forfeiture that would deprive the assured of the benefits of the representations made by it to induce the business. That does not involve any question of contradicting a written instrument by parol evidence.

The clause, "if any premium is not thus paid on or before the day when due, then (except as hereinafter otherwise provided) this policy shall become void, and all payments previously made shall remain the property of the company," is void. The New York statute controls the question of forfeiture. It is not within the power of the parties to add to, limit or set aside the paramount provision of the statute. This clause, therefore, in the policy, as construed by the Circuit Court of Appeals, should be held null and void.

Hurst Home Ins. Co. v. *Muir* (Ky.), 53 S. W. R., 3.

IX.

THE PROVISIONS OF THE POLICIES IN CONTROVERSY ARE UNCERTAIN AND AMBIGUOUS AND DIFFICULT OF INTERPRETATION.

The rule seems to be that the assured should recover if there is created "a doubt as to its (policy) proper interpretation of sufficient gravity to be resolved in favor of the insured."

The masterly opinion of Judge Shiras in this case on this proposition, construing the terms of the policies, as granting thirteen full months of insurance upon their face, should create a doubt as to the difficulty of proper construction of sufficient gravity to warrant a Court in

resolving the question of interpretation in favor of the insured.

But more than this, the cases of *New York Life Ins. Co.* v. *Dingley*, 93 Fed. Rep., 153, in the Circuit Court of Appeals for the Ninth Circuit, and of *Rosenplanter* v. *Provident Sav. & Life Ass. Soc.*, 96 Fed. Rep., 721, in the Circuit Court of Appeals for the Sixth Circuit, show that the respondent company itself, through its own eminent counsel, has never understood or construed these very provisions so as to be able to prepare and use a form of forfeiture notice under the New York statute that has been held sufficient or sustained in any Court. Hundreds of thousands of these notices have been sent out, and the State and Federal Courts alike have found them deficient in interpretation and expression of the very provisions in controversy, read in the light of the notice required by the New York statute for forfeiture. In the face of such a history, it is idle to say that the agreements contain provisions consistent, easily understood and unambiguous.

Moreover, Judge Sanborn indirectly admits that the insurance contracts are inconsistent on the vital propositions involved. The answer admits the month of grace (p. 20). Judge Sanborn says that the year's insurance is reduced by the policy, as a "counter proposition," from twelve months to eleven months and seventeen days, with the month of grace always to be regarded as extra. Not counting at all, therefore, the month of grace, Judge Sanborn says that the "proposition" (the application) calls for twelve months' insurance for the first full annual premium, while the "counter proposition" (the policy) grants insurance for only eleven months and seventeen days.

But the application is itself copied into the policy and became a part of it under the following provision in the policy (p. 6): "This contract is made in consideration of the written application for this policy and of the agreements, statements and warranties thereof, which are hereby made a part of this contract." This provision certainly does not subordinate the agreements of the application to the agreements of the policy. If there is any subordination, it would seem to be the very reverse. It is immaterial whether the application became binding before the policy was issued, for the purpose of this inquiry is satisfied when it is made binding in and as a part of the policy contract. The agreements in behalf of the company in the application are as firmly secured in the policy as are the agreements in behalf of the assured. The policy, therefore, includes as an express part thereof the application (pp. 6 to 14, inclusive), and the application should be controlling. At any rate, Judge Sanborn is forced to admit that the application constitutes one proposition, and the policy a counter proposition on the crucial question; but the proposition and the counter proposition are both parts of the same agreement, and, therefore, necessarily the agreement contains terms both ambiguous and inconsistent. While denying an inconsistent contract, Judge Sanborn most forcibly admits such, and, when admitted, the fatality of his logic is made manifest and his law inapplicable.

We will close this petition for the writ of certiorari with the opening words of Judge Caldwell in his dissenting opinion:

"The right decision of this case does not depend upon any technicalities of law. It is a case in which common sense and common honesty and legal sense and legal honesty are at one."

The petitioner has filed a brief in support of this petition for the writ of certiorari, under separate cover, to which the attention of the Court is earnestly directed.

Wherefore, your petitioner respectfully prays this Honorable Court that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record, and all proceedings of the said Circuit Court of Appeals in the said case therein entitled, Fred A. McMaster, Administrator, Plaintiff in Error, v. New York Life Insurance Company, Defendant in Error, to the end that the said case may be reviewed and determined by this Court as provided by Section 6, of the Act of Congress, entitled "An Act to establish Circuit Courts of Appeals," and to define and to regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes, approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said Act, and that the said judgment of the said Circuit Court of Appeals in the said case and every part thereof may be reversed by this Honorable Court, and your petitioner will ever pray.

Respectfully submitted,

HENRY J. TAYLOR,
FRANK E. GILL,
ERIC A. BURGESS,
Solicitors for Petitioner.

HENRY J. TAYLOR, Sioux City, Iowa,
Of Counsel for Petitioner.

STATE OF IOWA, County of Woodbury, ss:

Henry J. Taylor, being first duly sworn, says that he is one of the solicitors and of counsel for the above named petitioner, and as such has had personal charge, for said petitioner, of the case in the foregoing petition mentioned, in the Circuit Court of the United States, for the Northern District of Iowa, Western Division, and in the United States Circuit Court of Appeals, for the Eighth Circuit; that he has read the foregoing petition for writ of certiorari by him subscribed; and that the facts therein stated are true to the best of his information and belief.

HENRY J. TAYLOR.

Subscribed in my presence and sworn to before me by the said Henry J. Taylor, this 31st day of January, A. D. 1900.

[SEAL.] E. A. BURGESS,
Notary Public in and for Woodbury County, Iowa.